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SUPREME COURT
OF THE STATE OF WASHINGTON CLERK

FLIGHT OPTIONS LLC,

Appellant,

v.

WASHINGTON DEPARTMENT OF REVENUE,

Respondent.

APPELLANT

PETITIONER FLIGHT OPTIONS' REPLY BRIEF

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INTRODUCTION

The Department admits “there is no dispute” that “the tax at issue is a property tax,” not a utility excise tax as the trial court erroneously ruled. Resp. Br. at 23. And the Department does not dispute that trial court erred in basing its ruling on the Commerce Clause. Unable to defend the trial court’s judgment, the Department pleads with this Court to decide the case on alternative grounds. Resp. Br. at 11. The Department’s arguments are unavailing.

First, the Department’s “habitual use” argument is contrary to the controlling Washington authorities and mischaracterizes the federal cases on which it relies. Those federal cases, like the controlling decisions of this Court, have struck down all claims that moveable personal property obtained a tax situs in a non-domiciliary jurisdiction where the property was transitorily present on an irregular, unscheduled basis.

Second, the Department’s argument that it may impose property tax against Flight Options for its “use” of property owned by others is contrary to this Court’s decisions distinguishing property taxes and excise taxes as well as the plain language of the controlling statute, which mandates that “*all* personal property” be taxed according to its “ownership.” RCW 84.40.020.

Finally, Flight Options sales of private jets and management of privately-owned jets on behalf of their owners does not make it a public utility. Nothing in Ch. 84.12 RCW authorizes the Department to tax Flight Options in contravention of the unambiguous language of those

governing contracts. Moreover, regardless of Flight Options status as a public utility, nothing in Ch. 84.12 RCW abrogates the controlling tax situs and ownership requirements for assessment of property tax.

ARGUMENT

- A. **Under controlling Washington law, moveable property of a non-domiciliary transitorily within a county does not obtain a tax situs there unless it is “permanently present” through operation along fixed routes at regular schedules. The federal cases cited by the Department reach the same result.**

The Department does not dispute that in Washington property taxes are only imposed on personal property that has a tax situs in the taxing jurisdiction. RCW 84.44.010; *Guinness v. King County*, 32 Wn.2d 503, 202 P.2d 737 (1949). Rather, the Department argues that privately-owned jets managed by Flight Options from Richmond Heights, Ohio obtained a tax situs in King County. The Department’s theory is that the transitory, irregular, and unscheduled presence in various Washington counties of fractionally-owned planes at the whim of the planes’ fractional owners, constitutes a “habitual use” by Flight Options sufficient to create a taxing situs in King County (the only county in which the Department assessed tax). Resp. Br. at 34-47.

The Department’s argument is based on two false premises: (1) that Washington law of tax situs is silently “tied” to federal Due Process cases, and (2) that those federal cases did not require fixed routes and

regular schedules for a non-domiciliary jurisdiction to impose property tax on moveable personal property only temporarily present there.¹

With respect to its first error, the Department initially contends (without citation to any authority) that “[w]hen Washington courts face questions regarding [situs], they rely on federal law ... applying due process standards.” Resp. Br. at 34-35. However, the Department is later forced to concede “it is true that the Washington cases *Flight Options* cites do not mention the Due Process Clause.” Resp. Br. at 42. Thus, the Department is relegated to attempting to justify its false premise with the suggestion that it would be “logical” to “tie” Washington tax situs law to federal Due Process cases because situs “is a jurisdictional inquiry.” *Id.* Moreover, the Department agrees that this Court’s holding in *Canadian Pacific Railway v. King County*, 90 Wash. 38, 155 P. 416 (1916) applies long-standing, controlling Washington law. Resp. Br. at 35.²

With respect to its second error, contrary to the Department’s contention, the federal cases on which it relies expressly require “fixed routes and regular schedules” for mobile property to obtain a tax situs at a

¹ Additionally, as discussed in section B below, property taxes are imposed based on ownership of the taxed property. This Court has repeatedly explained that the fundamental distinction between property taxes and excise taxes (such as the use tax imposed by Ch. 82.08 RCW) is whether liability for the tax is triggered by the taxpayer’s ownership of property (a property tax) or the taxpayer’s actions (an excise tax).

² Much of the situs section of the Department’s brief detours through an irrelevant discussion of the history of the common law “home port” doctrine for taxation of ships (Resp. Br. at 43-46), a doctrine the Department acknowledges pre-dates the 1868 adoption of the Due Process Clause. Resp. Br., pg. 36, 44. Just as none of the cases cited by *Flight Option* are based on the federal Due Process analysis, they are not based on the home port doctrine either. In fact, the acknowledged controlling Washington case here, *Canadian Pacific*, does not even involve ships.

location other than the owner's domicile. *Central Railroad Co. of Pennsylvania v. Pennsylvania*, 370 U.S. 607, 613-14, 82 S. Ct. 1297, 8 L.Ed.2d 720 (1962). As Flight Options discussed (App Br. 16-18), in *Central Railroad* (its most recent pronouncement on the subject) the U.S. Supreme Court held that **only** the 158 railcars shown to operate on "fixed routes and regular schedules" had obtained a tax situs different from their owner's domicile. 370 U.S. at 614. The Court further held that another 1,507 railcars that were "regularly, **habitually and/or continuously** employed" outside the owner's domiciliary state but "did **not** run 'on fixed routes and regular schedules'" had not obtained a tax situs separate from their owner's domicile. *Id.* In so ruling, the Court expressly affirmed the controlling distinction it had previously articulated in reconciling two earlier cases, *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 64 S. Ct. 950, 88 L.Ed. 1283 (1944) and *Braniff Airways, Inc. v. Neb. State Bd. of Equalization*, 347 U.S. 590, 74 S. Ct. 757, 98 L. Ed. 2d 967 (1954).

In *Northwest*, the Court held that the tax situs of all of Northwest's airplanes remained in Minnesota, the owner's state of domicile. Even though the planes regularly left Minnesota and were "**continuously** engaged in flying from State to State"³ they had not established a "permanent location, i.e a taxing situs" outside Minnesota separate from Northwest's domicile. 322 U.S. at 295-96. By contrast, in *Braniff*, the Court held that a portion of Braniff's planes had established a permanent

³ 322 U.S. at 293 (emphasis added).

presence and therefore a tax situs in South Dakota, separate from their owner's domicile in Nebraska, by "operating over *fixed routes* and landing on and departing from airports within Nebraska on *fixed schedules*"⁴ and maintaining ground operations at the airports served by those regularly scheduled flights. *Braniff Airways*, 347 U.S. at 600-01. In so ruling, the Court expressly confirmed that *Northwest Airlines* remains valid and reconciled the contrasting results, explaining that the planes at issue in *Northwest* had not established a tax situs separate from their owner's domicile because there was no permanent presence in a non-domiciliary state. *Id.* at 602. Although these are the only two federal Due Process cases addressing the tax situs of aircraft, the Department fails to discuss the facts, reasoning, or holdings of either case.⁵

The Department's plea in this case boils down to quoting dicta from *Central Railroad* that leaves open the theoretical possibility that property could establish a sufficiently permanent presence in a state without fixed routes or regular schedules. Resp. Br. at 46-47. The reality is that in each of *Central Railroad*, *Braniff* and *Northwest* the Supreme Court consistently found that a "permanent" presence of moveable property sufficient to create a tax situs outside the owner's domicile required "fixed routes and regular schedules." *Central Railroad*, 370 U.S.

⁴ 347 U.S. at 591 (emphasis added).

⁵ The closest the Department comes is to self-servingly state (Resp. Br. at 45) that it would have sided with the dissent in the only state case either party found applying *Northwest* and *Braniff* to determine the situs of aircraft. *Peabody Coal Co. v. State Tax Comm'n*, 731 S.W. 2d 837 (Mo. 1987) (frequent but irregular and unscheduled landings in non-domiciliary state insufficient to create tax situs there). See App. Br. at 13-14.

at 614; *Braniff*, 347 U.S. at 602. As discussed above, “habitual” and even “continuous” use alone were expressly rejected as insufficient to establish tax situs in both *Northwest* and *Central Railroad* in the absence of fixed routes and regular schedules.

The Department also cites *Marye v. Baltimore & Ohio Railroad Company*, 127 U.S. 117, 8 S. Ct. 1037, 32 L. Ed. 94 (1888) as support for its proposed “habitual use” standard of tax situs. Resp. Br. at 36.⁶ While *Marye*, like *Central Railroad*, notes as a factual matter that the railcars at issue were “habitually” used in the state that attempted to impose property tax on them, as discussed in App. Br. at 15 and ignored by the Department, the actual holding in *Marye* was to enjoin the imposition of property tax. 127 U.S. at 241.

The Department has failed to identify any cases in which a Washington Court (or the U.S. Supreme Court) has upheld an assessment of property tax on moveable property transitorily present in a non-domiciliary jurisdiction on an irregular unscheduled basis. Because, as the Department acknowledges (Resp. Br. at 42), tax situs is “jurisdictional,” the lack of tax situs due to the transitory, irregular, and unscheduled presence of the fractionally-owned planes in Washington is a sufficient

⁶ In attempt to salvage its flawed theory, the Department tries to disguise the fact that the privately-owned jets in this case are brought into Washington, if ever, only at the whim of their fractional owners by repeatedly arguing that “Flight Options’ use” of the property was habitual. Resp. Br. at 35, 39, 47. This falsely implies that Flight Options controls where the aircraft will travel; however, the record is clear that the fractional owners make decisions as to an aircraft’s “use” and destination. CP 35.

basis in itself to reverse the trial court and order entry of judgment for Flight Options. The Court need not reach the remaining issues.

B. The Department ignores the controlling statute, which expressly requires that “all personal property” be taxed according to its ownership.

As the Department acknowledges, RCW 84.40.020 expressly provides that “*All* personal property” is taxed based on its “ownership.” Resp. Br. at 22 (emphasis added). The Department even emphasizes that this controlling statute has not been amended since the Court of Appeals, applying the statute in accordance with its plain language, held that “*[o]wnership* and not *possession* is taxable” when enjoining a property tax assessment against a person who was not the owner of the taxed property. Resp. Br. at 22, quoting *Star Iron & Steel Co. v. Pierce County*, 5 Wn. App. 515, 525, 488 P.2d 782 (1971) (emphasis Court’s). Inexplicably, the Department attempts to distinguish *Star Iron* on the grounds that the “court based its holding in *Star Iron* first and foremost on the controlling statute, RCW 84.40.020.” Resp. Br. at 22. Rather than distinguishing the case, the Department actually affirms the point made in Flight Options opening brief – that the controlling statute expressly requires property taxes to be assessed against the owner of the taxed property and that Washington Court’s have enforced the plain language of the statute by enjoining assessments against persons other than the owner. App. Br. at 6. The plain language of the controlling statute unambiguously applies to “*all* personal property”; it does not exclude the planes at issue here.

The Department asks the Court to infer an unwritten exception to RCW 84.40.020's express requirement that "**all** personal property" be taxed according to its ownership. The Department would have the Court infer an exception to the unambiguous statutory language by combining (1) the Department's statutory duty under RCW 84.12.270 to determine the total Washington value of the "operating property" of specified "inter-county public utilities" and (2) the absence of an "ownership requirement" in the statutory definition of operating property. Resp. Br. at 22. As this Court has recently affirmed, it is improper to infer tax provisions contrary to the unambiguous plain language of a tax statute. *HomeStreet, Inc. v. Dep't of Revenue*, __ Wn.2d __, __ P.3d __, Slip Op. at 7-8, 10 (Docket No. 80544-0, June 18, 2009).

Moreover, the Department's attempt to infer an unstated exception improperly disregards RCW 84.12.210, which provides that operating property "used but not owned by an operating company" is taxed to property's owner, thereby affirming the mandate of RCW 84.40.020 that "**all** personal property" be taxed based on its ownership. *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 708, 985 P.2d 262 (1999) (related statutes are read together and harmonized). As the Department acknowledges (Resp. Br. at 25), in *Canadian Pacific* this Court held, consistent with the controlling statutes, that property tax could only be assessed against the **owner**, not the operator, of railroad cars that had obtained a tax situs in King County by virtue of their permanent

presence on fixed routes and regular schedules. *Canadian Pacific*, 90 Wash. at 45.

The Department next asks the Court to ignore the unconstitutional result that would follow from permitting the Department to assess property tax against Flight Options when collection of the tax would be enforceable by seizing and selling planes owned by others. Resp. Br. 24. The Department attempts to distinguish *State v. Lawton*, 25 Wn.2d 750, 764-65, 172 P.2d 465 (1946) on the grounds that the case involved an employment tax lien rather than a property tax lien. This attempted distinction is meaningless. The constitutional defect identified in *Lawton* was the enforcement of a tax assessed against one person by foreclosure of a lien on property *owned* by a different person. The same constitutional defect would result if the Department were permitted to assess property tax against Flight Options for property that Flight Options does not own.

The Department suggests that although its assessments would make Flight Options liable for the tax, the tax is not actually imposed on Flight Options because property taxes are “primarily in rem in character.” Resp. Br. at 24. Ironically, the case the Department cites to, *Clark-Kunzl Co. v. Williams*, 78 Wn.2d 59, 469 P.2d 874 (1970), enjoins the assessment of property tax against a proposed taxpayer who was not the owner of the taxed property.⁷

⁷ While property tax may be “in rem in character” the taxes are necessarily paid by persons, not inanimate objects. As the Court explained in *Trinova Corp. v. Michigan Dep’t of Treasury*, 498 U.S. 358, 374 (1991) “a tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes.” Likewise a tax imposed on property and assessed against a particular person is a tax against the person assessed.

Finally, the Department attempts to disregard the inherent conflict between its own admission that this case involves a property tax (Resp. Br. at 23) and its contention that it can hold Flight Options liable for property tax because Flight Options engages in the activity of managing fractionally-owned planes on behalf of their owners. Resp. Br. at 12. As the Department acknowledges, in *Covell v. City of Seattle*, 127 Wn.2d 874, 890, 905 P.2d 324 (1995) this Court explained that the defining characteristic of a property tax is that liability for property taxes arises from the taxpayers' "status as property owners." In contrast, an excise tax is a tax for which liability arises from an activity engaged in by the taxpayer. 127 Wn.2d at 890. Here the Department seeks to assess tax against Flight Options, not because of its "status as property owner,"⁸ but rather because of Flight Options' activities in selling fractional ownership interests in airplanes and managing those planes on behalf of their owners. As with tax situs, the Department's unauthorized effort to assess property taxes against Flight Options for property owned by others is an independent basis for reversing the trial court and ordering entry of judgment for Flight Options.

⁸ The Department suggests that Flight Options should be deemed the owner by analogy to *Wasser & Winters Co. v. Jefferson County*, 84 Wn.2d 597, 599, 528 P.2d 471 (1974), a case in which the contract purchaser of standing timber was found to be the owner of the timber notwithstanding the sellers retention of title as security for full payment. The case does not support the Department's argument, Flight Options is the seller, not the purchaser of the planes and title is not retained by Flight Options but transferred to the purchasers and registered with the FAA. CP 34.

C. Flight Options sales of planes and management of privately owned planes does not make it an inter-county public utility. In any event tax situs and ownership requirements apply equally to the property tax assessment of public utilities.

The Department persists in its effort to re-characterize Flight Options contracts (by which it sells fractional ownership interests in private jets and pursuant to a separate contract manages privately owned-jets on behalf of the owners) as “a method by which Flight Options provides air transportation for compensation.” Resp. Br. at 15. As Flight Options discussed (App. Br. at 19-20), this Court has held that the Department has no authority to re-characterize a taxpayer’s contracts contrary to their plain terms. *Weyerhaeuser Co. v. State Dep’t of Revenue*, 106 Wn.2d 557, 565-66, 723 P.3d 1131 (1986). The Department attempts to distinguish *Weyerhaeuser* by noting that the case “does not concern RCW 84.12 in any manner nor discuss public utilities.” Resp. Br. at 31. The purported distinction is simply irrelevant. *Weyerhaeuser* is based on the absence of express statutory authority to impose tax contrary to the taxpayer’s contracts. The Department does not suggest that any provision in Ch. 84.12 RCW expressly authorizes it to impose tax contrary to the parties’ contracts.

The Department’s attempt to distinguish *Fall Creek Constr. Co., Inc. v. Dir. of Revenue*, 109 S.W.3d 165 (Mo. 2003) on the grounds that the case involved a use tax rather than a property tax also misses the mark. Resp. Br. at 33. As Flight Options discussed, the Missouri Supreme Court expressly rejected the same argument made by the Department here – that

Flight Options sales contracts and management agreements should be deemed to be a form of transportation service rather than what they “clearly and unambiguously” are, the sale of “an interest in tangible property – the aircraft.” App. Br. at 20, *quoting Fall Creek*, 109 S.W.3d at 170.

Nor is the Department’s effort to distinguish *Weyerhaeuser Timber Co. v. Henneford*, 185 Wash. 46, 53 P.2d 308 (1936) of any assistance to its position. As the Department concedes, this Court held that Weyerhaeuser Timber’s operation of a private logging railroad did not make it a public utility subject to central assessment because the Legislature intended that central assessment only apply to “quasi-public carriers” that hold themselves out to the public as such. Resp. Br. at 32. Like Weyerhaeuser Timber, Flight Options is not a public carrier and does not hold itself out as such. Nevertheless, the Department contends, without explanation or citation to authority) that the case is distinguishable on the theory that “carrier for hire” means something different than “transporting people and/or property for compensation.” *Id.* The Department’s contention is flatly contradicted by the Court’s opinion, which defines carrier “as one that undertakes the transportation of persons or movable property ... for hire or reward.” 185 Wash. at 50. Because Flight Options’ sale of private jets and management of those jets on behalf of their owners does not make it a public utility, it is not subject to central assessment by the Department. As discussed in App. Br. at 12-13, any property tax owed by fractional owners domiciled in Washington on their

fractional ownership interest is properly assessable by the county assessor of the county in which the owner is domiciled, not by the Department. RCW 84.08.010.

Regardless of whether or not Flight Options is a public utility, nothing in Ch. 84.12 abrogates the requirements discussed in Sections A and B above that property tax can only be imposed on property with a tax situs in the taxing jurisdiction and must be assessed against the owner of the taxed property. RCW 84.12 grants the Department authority to centrally value the Washington property of inter-county public utilities so that utility property such as transmission lines that cross multiple counties is valued uniformly and allocated among the various Washington counties in which it is located. *Northwest Improvement Co. v. Henneford*, 184 Wash. 502, 512, 51 P.2d 1083 (1935). Ironically, the Department's allocation of the entire 2005 and 2006 assessments exclusively to King County belies its claim that it is relying on the plain language of RCW 84.12, which expressly mandates that the Department "*shall* apportion such value to the respective counties entitled thereto." RCW 84.12.350 (emphasis added).⁹

⁹ The Department attempts to distract this Court by arguing that Flight Options somehow "neglected" to provide information regarding the airports at which the assessed aircraft landed. Response Brief, pg. 10 n.4. The Department fails to mention that it did not request this information. When the Department sent its annual return request to Flight Options in June 2005, the Department instructed that "[b]ecause of the late time frame, we ask as a minimum that you provide this list and the statistics in Washington -- ie *flight and ground hours by aircraft type for the system and state of Washington*." CP 715 (emphasis added). Moreover, the Department never suggested that Flight Options' response was deficient. Indeed, several months after receiving the response, the Department affirmed that "We will apportion this value to each of the counties you

At best, the Department argues that the proper application of RCW 84.12 in this case is ambiguous under the controlling state law requirement that all property taxes be assessed with reference to ownership. However, to the extent that any doubt exists as to the construction of RCW 84.12, 84.40.020 or 84.44.010 this Court has recently reiterated its long-standing rule that “[a]mbiguities in taxing statutes are construed ‘most strongly against the government and in favor of the taxpayer.’” *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 364, 166 P.3d 667 (2007) (en banc) (quoting *Estate of Hemphill v. Dep’t of Revenue*, 153 Wn.2d 544, 552, 105 P.3d 391 (2005)). This rule applies “no less when interpreting facts in a tax case and concluding therefrom the applicability of a taxing statute.” *Foremost Dairies, Inc. v. State Tax Comm’n*, 75 Wn.2d 758, 763, 453 P.2d 870 (1969).

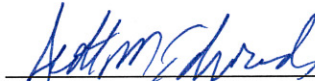
CONCLUSION

For the reasons presented above and in its Brief of Appellant, Flight Options, LLC respectfully requests that the Court reverse the Superior Court and direct entry of summary judgment in favor of Flight Options.

operated in.” CP 717. Flight Options cannot be blamed for the Department’s failure to follow the statutory language that it purports to rely upon.

RESPECTFULLY SUBMITTED this 30th day of June, 2009.

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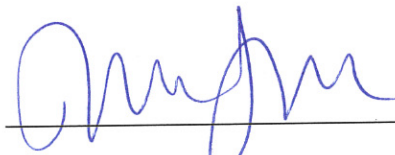
CERTIFICATE OF SERVICE

I certify that a copy of Petitioner Flight Options' Reply Brief was
hand delivered via messenger to:

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I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

Dated this 30th day of June, 2009.



Michelle Fu